Filed 7/10/19 P. v. Gutierrez CA4/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. JESUS GONZALES GUTIERREZ, Defendant and Appellant.	D074581 (Super. Ct. No. RIF1503925)

APPEAL from a judgment of the Superior Court of Riverside County, Charles J. Koosed, Judge. Affirmed; remanded for limited proceedings pursuant to *People v. Franklin* (2016) 63 Cal.4th 261, 284 (*Franklin*).

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

After consuming nearly a dozen drinks and getting ejected from a strip club, Jesus Gonzales Gutierrez went home, armed himself with a kitchen knife, returned to the club parking lot, and stabbed two complete strangers, killing one. Testifying in his defense at trial, he claimed he was too drunk to remember stabbing John F. (the 67-year-old murder victim) and that he stabbed Alec A. in self-defense. Rejecting these claims, the jury convicted him of premeditated first degree murder of John (Pen. Code, § 187, subd. (a), count 1)[1] and premeditated attempted murder of Alec (§§ 187, subd. (a), 664, count 2), finding he had personally used a deadly and dangerous weapon as to both counts. (§§ 12022.7, subd. (b)(1), 1192.7, subd. (c)(23).) As to count 2, the jury further found that Gutierrez personally inflicted great bodily injury. (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8).)

Gutierrez challenges the sufficiency of the evidence of premeditation and great bodily injury, evidentiary rulings and related jury instructions, and alleged prosecutorial misconduct. As to each of these claims, we either find no error or no prejudice. The People concede Gutierrez's final claim, that due to recent changes in the law he is entitled to a limited remand for proceedings under *Franklin*, *supra*, 63 Cal.4th at page 284, for an eventual youth offender parole hearing. We accept that concession and remand the matter for that limited purpose. In all other respects, we affirm the judgment.

---

1 Further statutory references are to the Penal Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

On August 9, 2015, 24-year-old Gutierrez cashed a tax refund check for $2,500 and decided to celebrate at Angels strip club in Corona. Earlier that day he drank three 25-ounce cans of beer at his sister's residence and a similar-sized can at his mother's house, where he lived. Gutierrez arrived at Angels around 8:10 p.m. Over the next couple of hours, he consumed 10 or 11 shots of tequila. A dancer named Bree gave Gutierrez a private dance in the VIP room and warned him he could be ejected when he tried to touch her. At some point after the private dance, Gutierrez started dancing near the stage area and toppled a chair.

A bouncer approached Gutierrez at the bar and invited him outside for a cigarette. Outside Angels, the bouncer punched Gutierrez twice in the stomach, making him keel over. Another bouncer joined and told Gutierrez not to return. Inside Angels, patron Ernest B. inferred from the bouncer's comments that Gutierrez had been ejected. When Ernest stepped out to smoke, he saw Gutierrez staring at the Angels's entrance with a "blank" look that made him uncomfortable.

Gutierrez left on foot, leaving his moped behind. He wound up lost in a trailer park, asking into his phone, "where is my home." Husband and wife Luis M. and Raquel M. approached him on their driveway. Gutierrez smelled of liquor, was difficult to understand, and could "barely walk." He kept repeating that "demons were after him and the voices wouldn't stop." He claimed his ex-girlfriend had performed witchcraft on him.

The couple sat him down, anointed him with oil and prayed for him, speaking in tongues. Gutierrez first seemed "very mad" and "drunk," but after 15 to 20 minutes of

prayer, appeared calmer and "just crying." He was unable to tell the couple his name or where he lived. They used his phone to call his mother and drove him home about an hour after they first encountered him.

When they reached his home, Gutierrez's mother helped him out of the car. Gutierrez felt "pretty drunk" by that point. After using the restroom, he realized he was still angry and wanted to confront the bouncers who ejected him. He walked up to a container of kitchen utensils, removed the largest knife, took it out of its plastic sheath, and tucked it into his pants waistband. His mother tried to take the knife away, but he held firm, walked out of the house, and headed back to Angels.

After arriving at Angels, Gutierrez stood waiting in the parking lot. At some point, John F. tried to maneuver his car into the same space where Gutierrez was standing. Although John was at Angels earlier that night, Gutierrez did not recognize him. Seeing John's car pull within three feet of him, Gutierrez stepped aside.

There were no eyewitnesses to the homicide, and Gutierrez offered shifting accounts as to what happened next. The night of the incident, he told detectives that John said something that made him angry. At trial, he claimed his earlier statement was just a "guess" to help police "connect[] the puzzle." What really happened was that John stepped out of his car and stood facing him two feet away. But Gutierrez could not remember what happened next.

John was stabbed three times, twice in the chest and once in the back. The pathologist did not know the order of the three injuries. One stab wound was six inches deep and cut through a lung and the aorta; it would have been independently fatal.

Another stab wound to the lower chest was a little over six inches deep and penetrated the heart muscle; it too would have been independently fatal. A final nonfatal stab wound to the lower back was four-and-a-half inches deep.

Some minutes after John was stabbed, Alec A. and his friend Nick pulled into the parking lot shared by Angels and the adjacent billiards club, Racks. Nick went inside Racks while Alec sat on a bench outside to finish a phone call. Alec watched as Gutierrez briefly entered Racks, then stepped back outside only a few minutes later. Gutierrez sat down oddly close to Alec on the bench, so near their pants touched. Feeling uncomfortable, Alec commented about the "weird" stranger to the person on the phone.

Alec stood up, walked to his car, opened his car door, and briefly looked for something inside. Not finding it, he closed the door thirty seconds later and turned to find Gutierrez standing two feet in front of him. Alec asked, "What's up?" thinking Gutierrez wanted something from him. Knife already in hand, Gutierrez looked Alec in the eye and stabbed him in the chest in "one quick motion." He tried to stab two more times, but Alec dodged both attempts and made his way between parked cars to escape. Gutierrez pursued him but tripped and fell. Seeing Gutierrez reach for his knife on the ground, Alec threw a cell phone at his head to immobilize him.

Alec then ran into Racks and yelled out for Nick. The two rushed outside to retaliate against Gutierrez. Gutierrez dashed across the street, with Alec and Nick in pursuit, but tripped at the center island and dropped the knife. Nick caught up with Gutierrez at the island. The two wrestled, but Gutierrez managed to escape. Alec chased after Gutierrez, challenging him to fight. Then Nick approached Gutierrez with a

baseball bat he had retrieved from the trunk of Alec's car. Seeing Nick with the bat, Gutierrez sprinted off. Losing blood and feeling faint, Alec stopped pursuing and made his way back to Racks.

Responding to a reported stabbing near Racks at 11:25 p.m., officers with the Corona Police Department arrived at the scene. Nick pointed them to the bushes where Gutierrez had run. Helicopter and police K-9 units tracked Gutierrez hiding in thick brush and directed him to come out. Gutierrez complied and was taken into custody. Search dogs tracked down a knife and envelope containing cash nearby. Sergeant Steven Sears arrived around midnight to preserve crime scene evidence. Approached by bystanders who reported a dead body, he discovered John's body by the side of his car. A shoe print near John's car matched the shoe that fell off as Gutierrez ran from Alec and Nick.

Meanwhile, paramedics transported Alec to the hospital. Doctors applied three staples to close the two-centimeter wound in the middle of Alec's chest. The knife did not penetrate any organs, and the staples were removed after nine days. There were no complications in the healing process.

The Riverside County District Attorney's Office charged Gutierrez by information with the murder of John (§ 187, subd. (a), count 1) and attempted murder of Alec (§§ 187, subd. (a), 664, count 2). The information alleged a personal weapon use enhancement as to both counts (§§ 12022, subd. (b)(1), 1192.7, subd. (c)(23)). As to count 2, it further alleged that Gutierrez personally inflicted great bodily injury on Alec within the meaning of sections 12022.7, subdivision (a) and 1192.7, subdivision (c)(8).

During a six-day jury trial, the prosecution examined Ernest, Gutierrez's mother, several members of the Corona Police Department, and a pathologist who testified about John's autopsy. Toxicologist Erin Crabtrey testified for both parties. She extrapolated Gutierrez's blood alcohol concentration at 11 p.m., the approximate time of John's murder, to be between 0.24 and 0.28 percent. That level was consistent with someone consuming nine shots of tequila all at once around 10:00 p.m. A person with that level of alcohol would likely be mentally impaired. Physical impairment such as stumbling, dropping things, or difficulty with balance likely indicate that a person is already mentally impaired. Crabtrey explained the link between higher blood alcohol levels and memory blackouts. But blackouts only relate to a person's memory or recollection, not with their intentions while taking certain actions.

Gutierrez testified he blacked out when killing John, and that he stabbed Alec in self-defense. During cross-examination, the prosecutor established that Gutierrez remembered nearly everything that night except John's killing, and made conscious decisions throughout the evening to arm himself and return to Angels. Luis and Raquel testified for the defense, recounting Gutierrez's statements that demons were chasing him. These statements could be considered only to show intoxication. Finally, the defense called Alec's treating physician to testify about the severity of his injuries from the single stab wound. During closing argument, defense counsel conceded second degree murder as to John but claimed intoxication negated premeditation and deliberation. As to Alec, counsel urged the jury to acquit based on self-defense or convict of attempted voluntary manslaughter.

The jury convicted Gutierrez as charged, returning first degree premeditated murder on count 1 and premeditated attempted murder on count 2 with true findings on each of the associated weapon use and great bodily injury enhancements. The court imposed a 37-year prison term: 32 years-to-life indeterminate sentence, calculated as 25 years to life on count 1 and a consecutive term of seven years to life on count 2. The indeterminate sentence followed a five-year determinate sentence, calculated as one year for each of the two weapon use enhancements and three years for the great bodily injury enhancement on count 2. At Gutierrez's request, the court authorized using the cash found in the crime scene envelope toward the $5,000 victim restitution fine.

DISCUSSION

Gutierrez appeals his convictions on several grounds. He challenges the sufficiency of the evidence supporting the findings of premeditation and deliberation on counts 1 and 2. He also claims there is insufficient evidence to support the great bodily injury enhancement attached to count 2. Finding sufficient evidence, we reject both claims as well as the ancillary claim that the court committed instructional error with regard to the great bodily injury enhancement.

As to Gutierrez's remaining claims, we conclude there was no prejudice from any erroneous admission of Gutierrez's statement to detectives that he was an angry drunk. We disagree that the court excluded evidence of hallucination or compelled him to elect a defense as to John's murder. Finally, to the extent the prosecutor committed misconduct by attacking defense counsel during his rebuttal argument, it was harmless.

The parties agree Gutierrez is entitled to a limited remand under *Franklin, supra*, 63 Cal.4th at page 284. We accept this concession and remand for the trial court to determine whether Gutierrez had sufficient opportunity to create a record of youth-related mitigating factors for an eventual youth offender parole hearing (§ 3051) and, if not, afford him such opportunity consistent with *Franklin*.

1. *Sufficiency of the Evidence*

Gutierrez argues that insufficient evidence supports the jury's finding of premeditation and deliberation as to counts 1 and 2 and the great bodily injury enhancement attached to count 2. In evaluating these claims, we review the whole record in the light most favorable to the judgment and determine whether it discloses any substantial evidence from which a reasonable trier of fact could find guilt beyond a reasonable doubt. (*People v. Cravens* (2012) 53 Cal.4th 500, 507.) We uphold the convictions unless there is no substantial evidence to support them under any hypothesis. (*Id.* at p. 508.) We do not substitute our judgment for that of the jury, or reverse merely because the evidence might also support a different finding. (*People v. Jennings* (2010) 50 Cal.4th 616, 638−639.) As we explain, there is sufficient evidence to support the jury's findings.

a. *Premeditation and deliberation (counts 1 & 2)*

Although he concedes liability for second degree murder as to John, Gutierrez challenges his conviction for first degree premeditated and deliberate murder. He argues the killing was "spontaneous"—he planned to get even with the bouncer, but there was no evidence of planning activity, motive, or anything in the manner of killing, to support a

finding of premeditation and deliberation *as to John*. Similarly, Gutierrez claims Alec's stabbing arose from a spontaneous quarrel, an "inexplicable explosion of unprovoked anger" inconsistent with premeditation. He asks us to strike the premeditation finding on count 2. As we explain, "though the evidence is admittedly not overwhelming, it is sufficient to sustain the jury's finding[s]" of premeditation and deliberation on both counts. (*People v. Perez* (1992) 2 Cal.4th 1117, 1127 (*Perez*).)

i. *Legal principles*

"A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) Otherwise, the classification of murder into two degrees would be meaningless. (*People v. Anderson* (1968) 70 Cal.2d 15, 26 (*Anderson*).) The jury must find sufficient evidence of *deliberation*, which "refers to careful weighing of considerations in forming a course of action" and *premeditation*, meaning the killing was "thought over in advance." (*Koontz*, at p. 1080.) " 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly." ' " (*Ibid.*) These same principles apply to a finding of premeditation and deliberation for attempted murder. (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1462, fn. 8.)

Surveying the case law, *Anderson* identified three categories of evidence relevant to premeditation and deliberation: (1) "facts about how and what defendant did *prior* to the actual killing," i.e., " 'planning' activity"; (2) facts "from which the jury could

reasonably infer a 'motive' to kill the victim"; and (3) facts about the manner of the killing from which the jury could infer "that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason.' " (*Anderson, supra*, 70 Cal.2d at pp. 26−27.) Typically, a finding of premeditation and deliberation rests on "evidence of all three types." (*Id.* at p. 27.) But it can rest on something less than all three, such as "extremely strong evidence of [category] (1) or evidence of [category] (2) in conjunction with either [categories] (1) or (3)." (*Ibid.*; see generally, *Perez, supra*, 2 Cal.4th at p. 1125.)

" 'Unreflective reliance on *Anderson* for a definition of premeditation is inappropriate.' " (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 294.) "The *Anderson* guidelines are 'descriptive, not normative,' and reflect the court's attempt 'to do no more than catalog common factors that had occurred in prior cases.' " (*People v. Young* (2005) 34 Cal.4th 1149, 1183.) "In developing these guidelines, the court did not redefine the requirements for proving premeditation and deliberation. [Citation.] The categories of evidence identified in *Anderson*, moreover, do not represent an exhaustive list of evidence that could sustain a finding of premeditation and deliberation, and the reviewing court need not accord them any particular weight." (*Ibid.*)

ii. *Analysis*

Contrary to Gutierrez's claim, the evidence supports a jury finding of premeditation and deliberation on both counts. Gutierrez felt angry after being ejected from Angels and came up with a plan to "get even." He armed himself with a knife, choosing the biggest one, and removed it from its sheath. He did not acquiesce when his

mother tried to take it away and block his path. He admitted "weighing the different scenarios" in grabbing the knife. "That [he] armed himself prior to the attack 'supports the inference that he planned a violent encounter.' " (*People v. Elliot* (2005) 37 Cal.4th 453, 471.) Gutierrez then returned to the parking lot outside Angels and waited for someone to come out. (*Perez, supra*, 2 Cal.4th at p. 1126 [planning activity was shown by evidence the defendant "did not park his car in the victim's driveway" and "surreptitiously entered the house"].)

Gutierrez discounts this evidence, claiming it only showed his plan to get even with the bouncer. But there were other inferences the jury could reasonably draw. Soon after Gutierrez was removed from Angels, Ernest went outside to smoke a cigarette. Gutierrez stared at him or at the entrance of Angels, making him so uncomfortable he hurried back inside. This testimony, combined with the nature of Gutierrez's unprovoked attacks on two apparent strangers could support an inference that Gutierrez was channeling his anger at anyone he perceived as connected to Angels, not just the bouncers who ejected him.[2] (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 421 [where defendant killed two people he barely knew by single gunshot wounds without provocation or struggle, his "purposive actions in driving to seek out various persons and then killing them . . . indicate[d] defendant had some motive for his killings—a method to his madness"].)

---

2 As Gutierrez points out, disbelief of his testimony does not amount to substantial evidence of the contrary. (*People v. Boatman* (2013) 221 Cal.App.4th 1253, 1267.) But the jury was entitled to consider whether, based on circumstantial evidence, Gutierrez's objective was broader than he described.

Moreover, planning could be inferred from the confrontations themselves. "Premeditation and deliberation can occur in a brief interval. 'The test is not time, but reflection.' " (*People v. Memro* (1995) 11 Cal.4th 786, 863.) Gutierrez recalled John walking up to him and standing face-to-face. He did not recall having the knife out at that point and agreed that to use it, he must have grabbed hold of it, taken it out of his waistband, and started stabbing John. Gutierrez stabbed John not once but three times, plunging the knife six inches into John's chest and four inches into his back. Where a defendant suddenly stabbed an unknown woman in the heart with a butcher knife, the Supreme Court could not say a jury could not reasonably find premeditation and deliberation. (*People v. Harris* (2008) 43 Cal.4th 1269, 1287.)[3]

Turning to Alec, Gutierrez sat unnaturally close on the bench and followed him to his car. When Alec turned and asked, "what's up?" Gutierrez stabbed him, knife already in his hand. Gutierrez admitted he stabbed Alec planning to hurt him, suggesting reflection and weighing of considerations. When Alec tried to escape, Gutierrez pursued, reaching for the knife even after tripping and falling to the ground. An inference of planning is strengthened by the murder of John just moments before. (*People v. Steele* (2002) 27 Cal.4th 1230, 1250 ["When a person stabs a woman to death, then leads another woman into her apartment with a knife in the pocket, the jury can readily infer

---

3 Because our analysis does not rely on Gutierrez's statement to detectives that John said something that angered him, we do not address Gutierrez's claim that "provocation that arises just before defendant attacks the victim is not equivalent to preexisting motive."

that the person possessed the knife for the same purpose."]; *People v. Pride* (1992) 3 Cal.4th 195, 248 ["Based on the number and placement of the wounds and the apparent fact that Catherine was the second victim, the jury could infer her death was calculated and was not the product of an unconsidered explosion of violence."].)[4]

In addition, the manner of stabbing both victims at close range supports a finding of premeditation and deliberation. (*Perez*, *supra*, 2 Cal.4th at p. 1124; *People v. Marks* (2003) 31 Cal.4th 197, 230.) Gutierrez killed John by inflicting three deep, plunging stab wounds. Two wounds were six inches deep or more in critical regions, the aorta, heart muscle, and lung. Although not fatal, the third stab wound was four and a half inches deep. Even if the first stabbing was spontaneous, repeated plunging motions thereafter indicate a reasoned decision to kill. (See *People v. Lewis* (2009) 46 Cal.4th 1255, 1293.) The same can be said as to Alec's stabbing. Gutierrez managed to stab Alec only once; Alec fended off two additional attempts by throwing his body backward. He was stabbed on his chest, and a deeper cut would have punctured a lung and might have been fatal. To the extent John's murder and Alec's attempted murder could be described as "execution-style," the manner of killing *independently* supports a finding of premeditation and deliberation. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 957.)

---

4 Gutierrez cites *People v. Bland* (2002) 28 Cal.4th 313, 331 for the rule that "transferred intent does not apply to attempted murder." Because our analysis does not rest on transferred intent, we do not reach that claim.

Viewed in the light most favorable to the judgment, there is sufficient (albeit not overwhelming) evidence of premeditation and deliberation for counts 1 and 2.

b. *Great bodily injury enhancement (count 2)*

Subject to conditions not relevant here, section 12022.7, subdivision (a) imposes a three-year sentence enhancement for any person who "personally inflicts great bodily injury on any person other than an accomplice." Great bodily injury is defined as "a significant or substantial physical injury." (§ 12022.7, subd. (f).) The jury was instructed that it requires more than "minor or moderate harm." (CALCRIM No. 3160.) Gutierrez claims there is insufficient evidence the two-centimeter stab wound on Alec's chest, resulting in 100 milliliters of blood loss and requiring three staples to close, constituted great bodily injury. "[D]etermining whether a victim has suffered physical harm amounting to great bodily injury is not a question of law for the court but a factual inquiry to be resolved by the jury. [Citations.] ' " 'A fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description.' " ' [Citations.] Where to draw that line is for the jury to decide." (*People v. Cross* (2008) 45 Cal.4th 58, 64 (*Cross*).) The injury must be more than trivial or moderate, but it need not be so grave that it causes permanent or prolonged bodily damage. (*Ibid*.) Proof that a victim's bodily injury is "great" is commonly established by evidence of the severity of the injury, the resulting pain, or the required medical treatment. (*Id*. at p. 66.) Nevertheless, "a 'significant or substantial physical injury' need not meet any particular standard for severity or duration . . . ." (*People v. Le* (2006) 137 Cal.App.4th 54, 58−59.)

Alec testified he felt "really sharp pain" when he was stabbed. He chased after Gutierrez but could not keep up because he was losing blood. Eventually he stopped pursuit, feeling lightheaded. When police officers tried to question him, his hearing and eyesight were fading. The wound on his chest was two centimeters wide, did not touch any vital organs, and required three staples to close. Alec described it as "moderately painful"—i.e., a five or six on a scale of one to 10. He lost 50 to 100 milliliters (less than half a cup) of blood; a typical blood donation is 500 milliliters. The staples were removed after a week; Alec reported no problems with the healing process. The jury viewed pictures of the wound, which were transmitted on appeal. We agree with the trial court's assessment when it denied acquittal on the enhancement allegation:

> "We're not talking about a little scratch. That required a medical procedure, three staples to close his wound. I recall seeing the wound. It looked like a significant wound to me."

It is the jury's role to decide where to draw the line to find a significant or substantial injury. (*Cross, supra*, 45 Cal.4th at p. 64.) On our record, we are not prepared to say as a matter of law that a two-centimeter-wide stab wound to the chest that caused "sharp pain" and necessitated hospitalization for staples is not a significant or substantial injury. (See *People v. Lopez* (1986) 176 Cal.App.3d 460, 463, fn. 5 & 465 [sufficient evidence of great bodily injury where defendant shot two victims in the hip and leg, causing one to scream and fall to the ground and the other to feel "fire," despite no evidence either needed medical treatment or suffered permanent injury]; *People v. Bustos* (1994) 23 Cal.App.4th 1747, 1755 [sufficient evidence of great bodily injury from abrasions, lacerations, and contusions caused when defendant struck victim's face with

enough force to knock her to the floor]; *People v. Wolcott* (1983) 34 Cal.3d 92, 107−108 [sufficient evidence of great bodily injury from single bullet wound to victim's calf leaving lodged fragments but causing little blood loss and requiring no sutures].)

People v. Martinez (1985) 171 Cal.App.3d 727, cited by Gutierrez, is inapposite. *Martinez* found insufficient evidence of great bodily injury where the victim was cut " 'a little bit' " in his back through two shirts and a " 'very heavy coat' " and was not taken to a hospital. (*Id.* at p. 735.) The prosecutor actually moved to strike the great bodily injury allegation, stating the testimony showed the wound " 'was almost like a pinprick.' " (*Id.* at p. 736.) *Martinez* did not involve a stab wound to the chest requiring staples and immediate medical care.

Gutierrez claims great bodily injury is essentially equivalent to "serious bodily injury" which is defined as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; *a wound requiring extensive suturing*; and serious disfigurement." (§ 243, subd. (f)(4), italics added.) He claims Alec's wound, which required only three staples, would not amount to a serious bodily injury and thus did not constitute great bodily injury under section 12022.7.

We are not persuaded. Although the original version of section 12022.7 defined great bodily injury similarly to serious bodily injury under section 243, it "never became law." (*People v. Escobar* (1992) 3 Cal.4th 740, 747.) The Legislature deleted the detailed enumeration of injuries defining great bodily injury "to preclude the possibility that the specific examples set forth therein would be construed as exclusive of other types

of injury not expressly enumerated." (*Ibid.*) "Although the terms 'great bodily injury' and 'serious bodily injury' have been described as being 'essentially equivalent' [citation] or having 'substantially the same meaning [citation], they have separate and distinct statutory definitions." (*People v. Taylor* (2004) 118 Cal.App.4th 11, 24.) "Unlike serious bodily injury, the statutory definition of great bodily injury does not include a list of qualifying injuries and makes no specific reference to [extensive suturing]." (*Ibid.*)

To the extent Alec did suffer great bodily injury, Gutierrez claims it was not "personally inflicted" by him. The enhancement requires personal infliction of great bodily injury. (§ 12022.7, subd. (a).) "To 'personally inflict' an injury is to directly cause an injury, not just to proximately cause it." (*People v. Rodriguez* (1999) 69 Cal.App.4th 341, 347; see *People v. Slough* (2017) 11 Cal.App.5th 419, 423.) Although Gutierrez concedes he was the direct cause of the two-centimeter wound, he claims it was Alec "who directly caused the lightheadedness, loss of blood, and other complications" by choosing to run after him. He claims this case is "closely similar" to *Rodriguez*, in which an officer was seriously injured while tackling a defendant fleeing on a bicycle. It was not enough in *Rodriguez* that the defendant proximately caused the police officer's injuries, since he did not directly act to cause them. (*Rodriguez*, at p. 349.) But *Rodriguez* is distinguishable. The officer's injury was in no way caused by the defendant; it was caused entirely by the officer's decision to tackle a moving bicycle. (*Id.* at p. 352.) Gutierrez admits he was the direct cause of the two-centimeter stab wound. We are unable to say that a two-centimeter stab wound to the chest requiring staples to close is as

a matter of law not a significant or substantial injury, independent of any blood loss or lightheadedness tied to the chase.[5]

In light of our conclusion, we likewise reject the instructional error claim as to the great bodily injury enhancement. Jurors were told that to return a true finding, they had to find that Gutierrez personally inflicted the injury on Alec. (CALCRIM No. 3160.) Gutierrez claims the court was required to further clarify the meaning of "personally inflicted," as jurors might have found the allegation true without determining *Gutierrez* directly caused the great bodily injury. There is no dispute that Gutierrez directly inflicted the two-centimeter stab wound on Alec's chest, which required three staples to close. Because this was sufficient to support the true finding, any failure to provide further clarification on causation is necessarily harmless.

2. *Character Evidence that Gutierrez Was an "Angry Drunk"*

Gutierrez claims the court erred in permitting the prosecutor to elicit improper character evidence. Over strenuous objection by defense counsel, the prosecutor asked Gutierrez during cross-examination whether he was truthful in stating during his police interview that he was an "angry drunk." Whereas Gutierrez claims this was prejudicial error, we conclude any error was harmless considering his own (albeit conflicting) testimony that he was both angry and drunk at the time he committed his crimes.

---

[5] The People go further, pointing out that there was *no evidence* that Alec exacerbated the knife wound to his chest by chasing after Gutierrez. To this, Gutierrez responds that jurors would "understand that running and challenging someone to fight and then running back causes the heart to pump more blood" and therefore lead to greater blood loss. Because the nature of the stab wound alone suffices to support the great bodily injury enhancement, we do not reach these arguments.

a. *Additional background*

During motions in limine, the trial court granted defense counsel's request to exclude "any mention of anger issues while Gutierrez is under the influence of alcohol." Referencing something Gutierrez's mom said in a police interview, he sought to exclude "anything regarding prior fights, prior violence, anger while intoxicated." The prosecutor agreed such evidence was irrelevant and promised to alert the court if anything changed that view. The court excluded the evidence. Nevertheless, during cross-examination, the prosecutor explored Gutierrez's statements to detectives that he was an angry drunk.[6]

"Q. When you drink, sir, are you an angry drunk? [¶] . . . [¶]

[Objection overruled]

"A. No.

"Q. You're not?

"A. No.

"Q. When you talked to the detective, do you remember saying, quote, unquote, 'I am an angry drunk'? [¶] . . . [¶]
[Objection overruled]

"Q. Do you remember saying that?
"A. Yes.

"Q. Okay. Now, were you lying?

---

6 Gutierrez's statement to the police was evidently inadmissible in the People's case in chief due to a violation under *Miranda v. Arizona* (1966) 384 U.S. 436, 475. (See *Harris v. New York* (1971) 401 U.S. 222, 226 [defendant's out-of-court statements obtained in violation of *Miranda* may be used for impeachment].) According to the probation report, an officer asked Gutierrez why he returned to Angels with a knife. In response, he indicated unprompted, "I turn into a different person when I'm drunk."

"A. No.

"Q. Are you an angry drunk? [¶] . . . [¶]

[Objection overruled]

"A. No.

"Q. Did you just say that to the detective?

"A. I believe so.

"Q. Okay. Do you remember saying that you turn into a different person when you get drunk?

"A. I remember saying that.

"Q. Is that true?

"A. Yes.

"Q. Okay. What kind of person do you turn into when you're drunk?

"A. A little bit obnoxious, happy. Mostly it.

"Q. Definitely not angry?

"A. No."

Returning to this line of questioning later, the prosecutor elicited different testimony:

"Q. It's your testimony that when you told the detective you were an angry drunk, that was a lie?

"A. No.

"Q. That's the truth?

"A. Yes."

At this point, defense counsel requested a sidebar and reiterated his objection that the prosecutor was eliciting "classic . . . evidence of a defendant's character," inadmissible because he had not opened the door. The prosecutor explained that it was both probative of truthfulness and "extremely relevant" to Gutierrez's mental state. Responding to this claim, defense counsel explained that the problem with character evidence was not relevance, but undue prejudice. He believed the prosecutor was attempting to establish that Gutierrez turned angry and violent that day, consistent with his past behavior when intoxicated.

The court overruled the objection. It noted that the forensic toxicologist had testified without objection that drunk people could be happy, sad, or angry. Given testimony about the general effects of alcohol on mood, and the defense's "core" focus on how alcohol affected Gutierrez's mental state, it believed the questions were "fair game."

The prosecutor referenced this evidence during closing arguments to highlight inconsistencies in Gutierrez's story:

> "You learned that he told the detective I turn into a different person when I'm drinking. That's what he told the detective. He told the detective I'm an angry drunk. That's what this man said to the detective, blamed it on him being drunk during the interview, blamed it on him not getting enough sleep. But then in court he says he's pretty obnoxious when he's drunk at the beginning of his testimony. By the end of his testimony just a couple hours later, he says he's chill. I mean, it's to the extent he cannot even remember his own lies. Lie after lie after lie. [¶] . . . [¶]
>
> "He's either lying to the detective or he's lying to you. They're exact opposites. Just like whether he's angry drunk or whether he's a chill drunk."

b. *Legal principles*

"In general, evidence of a defendant's character or a trait of his character—that is, his propensity or disposition to engage in a certain type of conduct—is not admissible to prove his conduct on a specific occasion." (*People v. Hall* (2018) 23 Cal.App.5th 576, 591; Evid. Code, § 1101, subd. (a).) "However, when a defendant offers evidence of his good character 'to prove his conduct in conformity with such character or trait of character,' the prosecution may offer evidence to rebut it." (*Hall*, at p. 591; Evid. Code, § 1102; see *People v. Tuggles* (2009) 179 Cal.App.4th 339, 358 [defendant placed his reputation for nonaggression at issue].) Likewise, if a defendant offers evidence showing the victim's violent character, then the prosecution may offer evidence of the defendant's violent character to show conduct in conformity with it. (*People v. Myers* (2007) 148 Cal.App.4th 546, 552 (*Myers*); Evid. Code, § 1103, subd. (b).)

Even if otherwise admissible, character evidence should be excluded if it is unduly prejudicial—i.e., if it would cause the jury to prejudge a person on extraneous factors. (Evid. Code, § 352.) We review the admission of character evidence for abuse of discretion. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1130.) If there was error, we consider whether the admitted evidence "rendered his trial so 'fundamentally unfair' [citation] as to constitute a deprivation of due process"—or if not, whether its exclusion would have made a different verdict reasonably probable. (*People v. Holloway* (2004) 33 Cal.4th 96, 128 (*Holloway*) [no prejudice in admitting defendant's statement to detectives that he had dangerous tendencies when intoxicated].)

c. *Analysis*

Gutierrez raises many challenges to the admission of "angry drunk" testimony. First, he argues at length that he did not open the door to such character evidence. The forensic toxicologist testified in general terms as to how alcohol can affect a person mentally and physically, including with respect to emotions. There was no evidence she had ever met Gutierrez, and she spoke only in generalities. Although Gutierrez testified that he was "feeling happy, drunk" earlier that night, he never testified to *generally* being a "happy drunk." Nor was the evidence admissible to show his violent character under Evidence Code section 1103, subdivision (b), as he did not first offer evidence that either John or Alec "had a character for violence."

Next, he claims the evidence served as improper impeachment on a collateral matter. (*People v. Lavergne* (1971) 4 Cal.3d 735, 744 [trial court properly excluded impeachment evidence "where the matter the party seeks to elicit would be inadmissible were it not for the fortuitous circumstance that the witness lied in response to the party's question"]; *People v. Fritz* (2007) 153 Cal.App.4th 949, 956 [a party may not introduce otherwise irrelevant evidence on cross-examination for the sole purpose of impeaching credibility].) Finally, he argues the inquiry should have been excluded as unduly prejudicial under Evidence Code section 352. Gutierrez claims that this was an "otherwise close case (particularly as to premeditation)," such that the erroneous admission of character evidence resulted in a federal constitutional violation.

The People take a different view. They contend Gutierrez opened the door, suggest the evidence was admissible as a prior inconsistent statement, and claim the

impact of alcohol on Gutierrez that night "was the 'central core of this case.' " To the extent any error occurred, the People claim it was harmless under the standard for state law error in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).

We need not decide whether the trial court erred, as any error did not prejudice Gutierrez. (*People v. Mungia, supra*, 44 Cal.4th at pp. 1131−1132.) Addressing a similar claim of error, the Supreme Court found no prejudice in *Holloway*, *supra*, 33 Cal.4th 96. Asked by detectives whether he had blacked out at any point on the night of the killings, the defendant in *Holloway* replied that he was not drunk and knew what he was capable of when he was drunk. (*Id.* at p. 128.) The defendant claimed the court erred in refusing to redact his admission that he could "hurt somebody" when drunk, but the court found any error harmless. (*Ibid.*) Admitting the challenged statement did not cause a miscarriage of justice (Cal. Const., art. VI, § 13; Evid. Code, § 353, subd. (b)) or render the trial so fundamentally unfair as to violate due process. (*Holloway*, at p. 128.) Instead,

> Defendant's remark was in substance a frank admission of his own dangerous tendencies. Defendant's personal evaluation of his own character—unsolicited by the detectives, who had not asked defendant whether he lost control when intoxicated—was far more reliable than typical third-party opinion of character evidence. The prosecution's use of defendant's freely offered assessment of his own weakness did not offend fundamental notions of fair trial.

Moreover, given other compelling evidence pointing to the defendant's guilt, including a false alibi and later admission to being present on the scene, the court likewise found no error under state law. There was no reasonable probability the jury would have reached a different verdict had the interview transcript been redacted to omit the defendant's

admission that he could hurt people when drunk. (*Id.* at pp. 128−129, citing *Watson, supra*, 46 Cal.2d at p. 835.)

Here, the challenged testimony had limited effect on the outcome of this case. As in *Holloway*, Gutierrez made a spontaneous statement during a police interview that he turned into a "different person" when drunk. Allowing inquiry into this statement was substantially similar to the inquiry deemed harmless in *Holloway*. That the prosecutor introduced this evidence as a prior inconsistent statement for impeachment purposes does not change the analysis. Indeed, although Gutierrez testified to being happy and drunk when he first arrived at Angels, he admitted being drunk and "angry," "furious," and "mad" when told to leave. Seeing him soon after he left Angels, Raquel described him as "very mad" and drunk. Fueled by rage, Gutierrez armed himself with a knife and returned to Angels to "get even." The danger of character evidence is that jurors may infer that because a defendant exhibits a particular character trait, he acted in conformity with that trait on a given occasion. (See *Myers, supra*, 148 Cal.App.4th at p. 553 ["the relevance of character evidence is premised on a continuity of character *over time*"].) Here, any error in allowing inquiry into whether Gutierrez admitted to generally being an angry drunk was not prejudicial under any standard, as he testified to being both angry and drunk on the night in question.

In finding no prejudice, we further note that this was not as close a case as Gutierrez contends. He conceded second degree murder liability as to John and admitted stabbing Alec minutes later. Gutierrez's testimony that he did not remember stabbing John and stabbed Alec upon provocation contradicted earlier statements to detectives that

he remembered stabbing John in the stomach and merely punched but did not stab Alec. Alec offered a markedly different account that he was stabbed unprovoked. To believe Gutierrez, jurors would have to accept that he blacked out from intoxication at the precise moment of John's killing but was lucid enough to remember everything that happened before and after. In short, Gutierrez hampered his own credibility with his unbelievable account. Notwithstanding the prosecutor's reference to his "angry drunk" statement during closing arguments, it is exceedingly *unlikely* the jury relied on that general trait to conclude he deliberately stabbed John and Alec without provocation.

3. *Claims Connected to Gutierrez's Defenses*

The next three arguments pertain to Gutierrez's defense theories. Relying on discussions during motions in limine, he argues the court erred in excluding evidence that would support a hallucination defense on both counts and in refusing to instruct the jury on that theory. Likewise, citing the court's pretrial statement that he had to "choose what horse you're riding," he argues he was precluded from presenting evidence on count 1 that John had confronted him in the parking lot to support a theory of voluntary manslaughter based on heat of passion or imperfect self-defense. We reject both contentions. As we explain, the court did not limit Gutierrez's defenses but merely ruled that depending on the evidence presented at trial, certain evidence pertaining to defenses would not be relevant. This was a proper exercise of the court's gatekeeping role.

Finally, Gutierrez claims the prosecutor engaged in misconduct during closing arguments in commenting on defense counsel's failure to put forth evidence promised in

the opening statement. As we explain, assuming misconduct occurred, it was not prejudicial.

a. *Exclusion of hallucination evidence and denial of instruction*

Evidence that a defendant was hallucinating is inadmissible to negate his or her capacity to form any mental state. (§ 28, subds. (a)−(b); *People v. Saille* (1991) 54 Cal.3d 1103, 1112 [discussing abolition of diminished capacity].) However, such evidence is admissible to negate premeditation and deliberation to reduce first degree murder to second degree murder. (§ 28, subd. (a); *People v. Padilla* (2002) 103 Cal.App.4th 675, 679 (*Padilla*).) A defendant invoking this " 'diminished actuality' " defense must present evidence of his mental condition "to show he 'actually' lacked the mental states required for the crime." (*People v. Clark* (2011) 52 Cal.4th 856, 880, fn. 3 (*Clark*).) Where requested and supported by the evidence, the court should provide a CALCRIM No. 627, a pinpoint instruction concerning the effects of hallucination on premeditation and deliberation. (*People v. McCarrick* (2016) 6 Cal.App.5th 227, 243.)

Gutierrez argues the court prejudicially erred in excluding certain evidence and not providing CALCRIM No. 627 on the effect of hallucination on premeditation and deliberation. As we read the record, the trial court simply ruled that hallucination may be irrelevant and inadmissible depending on the defense presented. There was no error in excluding hallucination evidence or refusing a jury instruction.

i. *Additional background*

During pretrial motions, the prosecutor asked the court to exclude "any evidence regarding mental health issues." The defense team responded that it did intend to show

that Gutierrez was hallucinating the night of his crimes.[7] Although the defense did not plan to call an expert or have Gutierrez testify he was hallucinating, Gutierrez's mother would testify that he previously complained about flies attacking him when there were no flies, and Luis and Raquel would testify that Gutierrez claimed demons were chasing him.

The prosecutor questioned how this proffer would permit a finding that Gutierrez was hallucinating. He further argued that even if Gutierrez had seen flies or demons, there was no proffered link between those hallucinations and his actions. Whereas defense counsel in *Padilla*, *supra*, 103 Cal.App.4th 675[8] proffered experts to describe the concept of hallucination and testify that the defendant was hallucinating, no similar proffer was made here. Directing the court to CALCRIM No. 627, defense counsel responded that nothing in the instruction required expert testimony.

The court concluded that if Gutierrez testified that he acted in a certain way because he was hallucinating at the time, no experts were needed. Otherwise, it believed an expert would have to testify that Gutierrez suffered chronic hallucinations that prevented him from premeditating his actions. With such expert testimony, statements about demons made to Luis and Raquel could come in to show he was hallucinating.

---

7 Gutierrez was represented by a two-person defense team.

8 *Padilla*, *supra*, 103 Cal.App.4th 675 reversed a conviction of first degree murder, concluding the trial court erroneously excluded evidence from two psychologists that the defendant committed a retaliatory homicide after hallucinating that the murder victim had killed the defendant's father and brothers. As the court explained, this evidence was admissible to negate deliberation and premeditation so as to reduce first degree murder to second degree murder. (*Id.* at pp. 678−679.)

Without it, those statements were admissible solely to show his intoxication—i.e., "people who are drunk out of their mind say weird things." The court reasoned that absent a link, jurors would be asked to speculate what the demons were or what Gutierrez was thinking at the time of the stabbings. Likewise, any evidence from Gutierrez's mother that he previously saw "devil flies" did not explain his actions on the night in question. The court explained that defense counsel needed to "connect the dots" to allow nonexpert testimony about Gutierrez's past hallucinations and warrant an instruction on the defense.

Defense counsel responded that if Gutierrez was experiencing a blackout due to voluntary intoxication, percipient witness testimony would be needed to show that he was hallucinating. He explained that Gutierrez had two separate defenses to premeditation and deliberation—voluntary intoxication and hallucination—and was entitled to present evidence and receive a jury instruction on each.

At that point, the court distinguished voluntary intoxication from hallucination. Looking at the instructions for both (CALCRIM Nos. 625, 627), it reasoned that the hallucination instruction "works differently" and requires some "connection to the defendant's behavior that night." If the defendant testified on the stand that he was hallucinating that night (or an expert offered a similar view), then other family members could testify about past hallucinations, and statements about demons to Luis and Raquel could be considered for that purpose. Short of some causal connection, the evidence would be irrelevant and inadmissible to show he was hallucinating; it would be admissible solely to show intoxication. At a later point during pretrial hearings, the court

explained that absent a connecting link, the proffered hallucination evidence was more prejudicial than probative (Evid. Code, § 352).

At trial, no expert testified that Gutierrez suffered "chronic hallucinations." Testifying in his defense, Gutierrez claimed he did not remember killing John and stabbed Alec in self-defense. The defense called Raquel, who testified that an apparently drunk Gutierrez exclaimed that demons "were after him" and someone had put a curse or used witchcraft on him. Luis likewise testified that Gutierrez seemed drunk and said "something about witchcraft and a demon in his head and chasing him and he needed help." These statements were admitted solely to show Gutierrez's intoxication. The court instructed the jury on voluntary intoxication. (CALCRIM No. 625.)[9] It denied Gutierrez's request for an instruction on hallucination. (CALCRIM No. 627.)[10]

---

9 CALCRIM No. 625 provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill or the defendant acted with deliberation and premeditation. [¶] A person is *voluntarily intoxicated* if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. You may not consider evidence of voluntary intoxication for any other purpose."

10 CALCRIM No. 627 provides: "A hallucination is a perception not based on objective reality. In other words, a person has a hallucination when that person believes that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening. [¶] You may consider evidence of hallucinations, if any, in deciding whether the defendant acted with deliberation and premeditation. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant acted with deliberation and premeditation. If the People have not met this burden, you must find the defendant not guilty of first degree murder."

ii. *Analysis*

Gutierrez argues the court prejudicially erred in requiring him to draw a direct link between hallucinations and the crime. Comparing hallucination to the voluntary intoxication defense (§ 29.4, subd. (b)), he contends a hallucination may impair thinking and make it less likely that a defendant premeditated a crime. Accordingly, he believes the court erred in excluding his mother's testimony on past hallucinations concerning flies, admitting his "demon" remarks to Luis and Raquel only to show intoxication, and in not giving the jury CALCRIM No. 627.

As we explain, Gutierrez's decision not to elect a defense before trial made the court's pretrial rulings more challenging. Reviewing the court's exclusion of evidence for abuse of discretion (*People v. Vieira* (2005) 35 Cal.4th 264, 292), we find no error. It reasonably excluded testimony about past hallucinations and limited the use of his "demon" statements the night of the murder absent any indication that Gutierrez stabbed Alec or John because of a hallucination.

"A hallucination is a perception with no objective reality." (*Padilla*, *supra*, 103 Cal.App.4th at p. 678.) The test is *subjective* in nature. (*Id.* at p. 679.) "[A] person has a hallucination *when that person believes* that he or she is seeing or hearing [or otherwise perceiving] something that is not actually present or happening." (CALCRIM No. 627, italics added.) Jurors may consider evidence of hallucination solely as to whether a defendant *actually* formed a required specific intent—here, premeditation and deliberation. (*Padilla*, at p. 679; § 28, subd. (a).)

Gutierrez's statements to Luis and Raquel that he was being chased by demons would not support a nonspeculative jury finding that he was hallucinating when he stabbed John or Alec—nor would his mother's testimony that he had previously imagined seeing flies. Had Gutierrez testified that he was hallucinating, or presented expert testimony about his chronic hallucinations, the court made clear that this evidence could come in to support a hallucination defense. Without such a link, it reasonably refused to allow jurors to speculate what might be going on in Gutierrez's mind when he spoke of demons and witchcraft to Luis and Raquel. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 682 (*Babbitt*) [" 'evidence which produces only *speculative* inferences is *irrelevant* evidence' "]; *People v. Stitely* (2005) 35 Cal.4th 514, 549−550 (*Stitely*) ["Speculative inferences are, of course, irrelevant."].)

As we construe the record, the court did not prevent Gutierrez from presenting a hallucination defense. Rather, because hallucination is a subjective concept resting on what Gutierrez *actually* perceived, it required him to "connect the dots" to admit the proffered evidence. Having failed to do so, the court reasonably excluded and limited hallucination testimony on relevance grounds. (Evid. Code, §§ 210, 350.) And because no evidence supported it, the court properly denied a pinpoint instruction thereafter. (*People v. Stanley* (2006) 39 Cal.4th 913, 946 ["Pinpoint instructions must be given on request only where there is evidence to support them."].)

Gutierrez likens a hallucination defense to voluntary intoxication, stating "the question is simply whether the mental disorder or intoxicant interfered with defendant's mind or thought processes . . . ." In each of the cases he cites, the defendant proffered

expert testimony on intoxication or a mental condition, evidence the trial court here allowed but Gutierrez did not furnish.[11] Further, Gutierrez may be confusing the limited purpose for which hallucination evidence is admissible. He states it is not necessary to show that a particular hallucination motivated a murder or attempted murder; all that is required is to raise reasonable doubt as to whether a hallucination was likely to "encumber his thinking or judgment, such that it was less likely that he actually premeditated the crime." This belief informs his view that there is no requirement for "a causal connection between the hallucination and the crime."

Diminished capacity has been abolished in California. (§ 25, subd. (a).) In the guilt phase of a criminal trial, "evidence that the accused lacked the capacity or ability to control his or her conduct for any reason shall not be admissible on the issue of whether

---

11 For example, Gutierrez cites several cases finding error in excluding expert evidence. (*Padilla*, *supra*, 103 Cal.App.4th at p. 677 [expert should have been allowed to testify that defendant committed murder after hallucinating the victim had killed his relatives]; *People v. Cortes* (2011) 192 Cal.App.4th 873, 909 [expert should have been allowed to testify about defendant's mental condition and how it affected him at the time of the offense]; *People v. Herrera* (2016) 247 Cal.App.4th 467, 477−478 [expert should have been allowed to testify about defendant's psychiatric impairments at the time of the murder]; *Maria v. Muniz* (9th Cir. 2017) 704 Fed.Appx. 641, 644–645 (dis. opn. in part, Murguia, J.) [defense counsel was ineffective for failing to present expert testimony on hallucination during the guilt phase where such testimony was offered in the sanity phase].) Gutierrez also cites cases finding no error where expert testimony *was* proffered. (*People v. Breaux* (1991) 1 Cal.4th 281, 303 [psychiatrist "testified fully as to his opinion of defendant's condition before and at the time of the murder"]; *People v. Welch* (1999) 20 Cal.4th 701, 755 [no ineffective assistance where defense counsel highlighted expert testimony on the likely effects of intoxication on judgment and impulse control].) *People v. Daniel* (1944) 65 Cal.App.2d 622 was decided before the Legislature abolished the diminished capacity defense. There too, one expert testified that based on his alcohol and medication use, the defendant "could not deliberate at all"; another testified that he "did not have sufficient capacity to appreciate fully what he was doing." (*Id.* at p. 628.) None of these cases help Gutierrez.

the accused actually had any mental state with respect to the commission of any crime." (§ 29.2, subd. (b).) To assert " 'diminished actuality,' " a defendant must present evidence to show he *actually lacked* a specific intent—here, to premeditate and deliberate. (*Clark*, *supra*, 52 Cal.4th at p. 880, fn. 3.) Gutierrez offered no nonspeculative basis for the jury to infer he suffered from a hallucination that negated this specific intent. Hallucinations being subjective (*Padilla*, *supra*, 103 Cal.App.4th at p. 679), such connection was necessary. In short, the court did not err in excluding the proffered hallucination evidence or in denying the requested instruction.

b. *Compelled election of defenses*

Relying on the court's statements during pretrial motions to "choose what horse you're riding," Gutierrez argues he was improperly compelled to elect a defense. Specifically, he claims the court precluded him from presenting evidence at trial that it was John who confronted Gutierrez in the parking lot, recognizing him as the "obnoxious man from the bar earlier that evening," to support a conviction on count 1 for voluntary manslaughter based on heat of passion or imperfect self-defense. Gutierrez contends the court's ruling was either structural error or prejudicial under *Chapman v. California* (1967) 386 U.S. 18, 24. He further claims the error resulted in "spillover" prejudice" as to count 2.

The People respond that the trial court did not ask Gutierrez to abandon any defense. Rather, the court stated during motions in limine that certain evidence would be admissible or inadmissible, depending on the defense presented. We agree with this reading of the record. The trial court told Gutierrez he could present any defense he

wished, and the court would tailor evidentiary rulings accordingly. It did not "force" him to elect between defenses.

i. *Additional background*

During pretrial motions, the prosecution sought to exclude evidence regarding John's connection to a dancer at Angels named Kukla. When the court asked for clarification, defense counsel explained that John was a "sugar daddy" for Kukla and had dropped her off at Angels. Ernest, the bar patron, would testify that John was at Angels earlier that evening when Gutierrez was acting "drunk and obnoxious." The defense posited that John saw this behavior and confronted Gutierrez later in the parking lot, resulting in their confrontation. Defense counsel predicted Gutierrez would testify (consistent with his statement to police) that John said something to him about his behavior at Angels, prompting Gutierrez to stab him.

The court responded that this theory "makes a thousand percent more sense than devil flies flying around your client's head as to why he did what he did. And, again, if that's the theory you're going to set forth, then I think the relationship does have some relevance to it." But the court explained that if Gutierrez testified that John confronted him, evidence supporting a hallucination defense would not be admissible to explain his behavior. Thus, Gutierrez was "going to have to choose what horse you're riding in this race and make that argument and based on that, I will then be able to rule." To the extent defense counsel did not intend to reveal its theory at the outset, that made the court's job harder because it could not provide a "definitive" ruling.

In response, defense counsel explained that he did not want to lock into a theory and have to change it later. The court agreed and explained that it would base its evidentiary rulings and instructions on "how the evidence plays out." If the theory was that John initiated the confrontation, his relationship with Kukla would be allowed in and a voluntary manslaughter instruction would be given. But if the theory was "no, he was hallucinating that night and too intoxicated and it's got nothing to do with whatever he saw happen in the bar," then John's relationship with Kukla would be inadmissible "because it would have no relevance."

Pretrial motions continued another day. The prosecutor informed the court that, based on his discussion with the toxicologist, voluntary intoxication of alcohol did not cause hallucinations. Defense counsel responded, "We're not even going to mention hallucinations. I think the way the defense is going to play out is Mr. Gutierrez is going to testify first, and he's going to talk about what he remembers, what he didn't remember, whether or not he's ever had any hallucinations at all, whether or not he was hallucinating that day." Luis and Raquel would testify about "demon" statements Gutierrez made, but these would only show intoxication unless the defense could draw a link to his behavior that night.

At trial, the prosecution called bar patron Ernest, who arrived at Angels around 8 p.m. An older gentleman (John) gave a woman (Kukla) a quick hug and sat near Ernest at the bar. About two hours passed. Ernest eventually walked to the stage area, while John stayed at the bar. That was the extent of his interaction with John; Ernest noticed Gutierrez enter later. He saw Gutierrez talking with several dancers, inviting them for

drinks. He described these as "quick interactions" and did not recall Gutierrez enter the VIP room for a private dance. He did not remember seeing Gutierrez interact with the woman John had hugged. Gutierrez seemed to be dancing or "bopping around." At some point a chair slammed down, and Ernest later inferred that Gutierrez had been escorted out. He briefly encountered Gutierrez in the parking lot, felt uncomfortable, and returned inside.

As discussed, Gutierrez recalled some details of what transpired in the parking lot. When John pulled his car into the stall, Gutierrez moved a few feet to the side. Gutierrez remained angry at the bouncer, not at John. They faced each other, but no words were exchanged. He did not remember stabbing John.

As a matter of law, Gutierrez could not argue his hallucination or voluntary intoxication caused him to act in unreasonable self-defense so as to reduce a murder to voluntary manslaughter. (*People v. Elmore* (2014) 59 Cal.4th 121, 134−135; *People v. Soto* (2018) 4 Cal.5th 968, 970.) Instead, relying on a theory that John confronted him in the parking lot, he requested an instruction in count 1 on voluntary manslaughter based on imperfect self-defense or heat of passion (CALCRIM No. 571). The court denied the request, reasoning:

> "I don't believe there is sufficient substantial evidence as to support any of those theories. [Defense counsel] certainly sets forth a nice story, but there's just no evidence of it. Mr. Gutierrez testifies that he doesn't recall stabbing him, doesn't know why he stabbed him. There's no evidence at all, even circumstantially, that [John] did anything to Mr. Gutierrez. The -- he pulls into a parking stall in a dark parking lot, and when he pulls in, Mr. Gutierrez happens to be standing there. There's no evidence that [John] even saw Mr. Gutierrez in the bar. Mr. Gutierrez doesn't recall ever seeing [John],

> and we don't know whether [John] saw him. It's all speculation. It's all speculation. [¶]
>
> "There has to be some evidence, not just made up stuff you think, well, I want to be able to argue [John] saw Mr. Gutierrez do these things and then because of it he was angry such that when Mr. Gutierrez left the bar and then came back sometime later, [John] just happened to have been pulling in at the time. I mean, it's all just -- it's all just speculation. I mean, it's a good story. But it's -- the evidence doesn't support any of it at all. And there's nothing to indicate that [John] did anything to Mr. Gutierrez to put Mr. Gutierrez in any form of fear or cause any heat of passion because Mr. Gutierrez simply doesn't recall having stabbed the man or why he would have stabbed him or anything of that nature at all. Nothing. So for that -- those reasons, it's denied."

ii. *Analysis*

As we read the record, the trial court did not compel Gutierrez to elect a defense at the outset of trial. Instead, it merely indicated that depending on what theory the defense presented, certain evidence might or might not be relevant. This was a proper exercise of the court's gatekeeping function—it had no discretion to admit irrelevant evidence, including evidence resting on speculative inferences. (*Babbitt*, *supra*, 45 Cal.3d at p. 682; *Stitely*, *supra*, 35 Cal.4th at p. 549; Evid. Code, § 350.) " 'A defendant has the general right to offer a defense through the testimony of his or her witnesses [citation], but a state court's application of ordinary rules of evidence . . . generally does not infringe upon this right [citations].' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 995 (*O'Malley*).) Trial courts have wide latitude to exclude evidence that is only marginally relevant and could lead to confusion of the issues. (*Id.* at pp. 995−996 [no error in excluding evidence that defense investigator's secretary received an anonymous "scary" phone call; trial court's ruling did not implicate defendant's right to present a defense

where he failed to connect the call to his gang or establish that the gang was trying to frame him for the murders].)

Here, the court agreed with defense counsel that there was no need to "lock . . . into" a single defense theory when trial could play out differently than anticipated. It further agreed that Gutierrez had the right to present "alternative theories," *provided* they were "based upon the evidence." There is no ambiguity here that Gutierrez was not barred from presenting a defense that he stabbed after John being confronted. We reject Gutierrez's contrary view that the court conditioned its evidentiary rulings on "which sole theory the defense elected" and "eliminat[ed] an entire theory of defense."

Ultimately, no *evidence* supported a confrontation theory. Ernest did not recall any interaction between John and Gutierrez, Kukla and Gutierrez, or any obnoxious behavior by Gutierrez toward the dancers. Gutierrez remembered inappropriately touching a dancer named Bree but did not see Kukla or interact with John. Later at the parking lot, Gutierrez recalled no exchange of words and did not remember the circumstances of the stabbing. Here as in *O'Malley*, there was no error in excluding evidence regarding John's relationship with Kukla (62 Cal.4th at pp. 995−996), nor any basis to instruct the jury on voluntary manslaughter for count 1 based on heat of passion or imperfect self-defense. Finding no compelled election of a defense on count 1, we need not consider any alleged "spillover" prejudice as to count 2.

c. *Prosecutorial misconduct*

Gutierrez's final claim relating to defense theories is based on what occurred during closing argument. He asserts that the prosecutor committed misconduct in

referencing defense counsel's failure to produce evidence promised during opening statement that John was the aggressor. As we explain, even if misconduct occurred, it was harmless.

In closing arguments, a prosecutor may comment on a discrepancy between the defense opening statement and the trial evidence, to remind the jury that the verdict should rest only on the latter. (*People v. Harris* (1989) 47 Cal.3d 1047, 1085, fn. 19.) But it is improper to suggest bad faith based on defense counsel's failure to " 'make good' " on evidence cited during opening statements. (*People v. Pantages* (1931) 212 Cal. 237, 244−245 (*Pantages*).) Attacking the integrity of defendant's attorney can be as prejudicial " 'as an attack on the defendant himself.' " (*People v. Hill* (1998) 17 Cal.4th 800, 832 (*Hill*).)

In *Pantages*, defense counsel laid out a theory during his opening statement but was unsuccessful in repeated attempts to introduce relevant evidence at trial. During his closing argument, the prosecutor repeatedly attacked this failure " 'to make good the fulfillment of their promise.' " (*Pantages*, *supra*, 212 Cal. at p. 242.) He claimed defense counsel " 'knew they had no evidence and they knew in their hearts there was no such evidence' " but chose to raise a meritless defense theory in opening statement to " 'plant a seed' " in jurors' minds. (*Id.* at p. 243.) The opening argument was labeled a " 'smoke screen' "; from the start, the defense was based on " 'insinuation and innuendo' " without any evidentiary support. (*Ibid.*) According to the prosecutor, defense counsel knew in delivering his opening statement that he could not prove his defense. (*Id.* at p. 244.)

On these facts, the Supreme Court found misconduct and reversed. Defense counsel had not presented his opening statement in " 'bad faith' "; he was unsuccessful in repeated efforts to introduce supporting evidence after the trial court sustained the prosecutor's evidentiary objections. (*Pantages*, *supra*, 212 Cal. at p. 244.) Recognizing that opening statements are not evidence and convictions should be grounded in a defendant's own conduct, "in the absence of 'bad faith', [counsel's] failure to 'make good' should not be argued by the opposite party as a reason for a verdict." (*Ibid.*) The court reasoned that it was proper for the prosecutor to argue that although defense counsel told the jury he expected to prove certain facts, no evidence was admitted at trial. (*Id.* at p. 245.) However, "[t]o go further (and in the face of the fact that defendant had repeatedly, but unsuccessfully, attempted to introduce evidence relating to the situation which he had stated that he expected to develop) and to charge the attorney or attorneys who represented defendant with the grossest of 'bad faith' in the matter, and thereupon, impliedly at least, to predicate an impassioned and compelling argument demanding the conviction of defendant, constituted an error which was prejudicial to the substantial rights of defendant." (*Ibid.*)[12]

Gutierrez claims a similar error happened here. During his opening statement, defense counsel stated the evidence would show that John was at the bar earlier that evening when Gutierrez was "acting a fool" and touching the dancers. When Gutierrez

---

12 Although the court reversed based on multiple instances of prosecutorial misconduct, it explained that each separate instance of misconduct, such as attacks on defense counsel, "would not, standing alone, necessarily require such a result." (*Pantages*, *supra*, 212 Cal. at p. 278.)

returned to Angels armed with a knife, he was extremely drunk and angry at the bouncer who ejected him. John pulled in his car near where Gutierrez was standing. He then confronted Gutierrez face-to-face and said something that made Gutierrez angry. Gutierrez stabbed John in response; "[t]hat's what this is all about." Counsel indicated Gutierrez would probably testify that he just wanted to hurt John and was not trying to kill him. During closing arguments, the defense argued based on Gutierrez's testimony that he killed John while blacked out and did not premeditate or deliberate the crime. Counsel urged the jury to convict him instead of second degree murder.

On rebuttal, the prosecutor remarked that second degree murder was the "lowest" option, since voluntary intoxication could not reduce second degree murder (§ 29.4, subd. (b)). He highlighted "how this case has kind of evolved and changed from the very start for the defense." Referencing defense counsel's opening statement, the prosecutor stated:

> "Now, remember, in the beginning of this case I stood up here and [defense counsel] stood up here and we made certain promises. It wasn't evidence. But we told you what we said you were going to see in this case. They weren't offering murder then. In fact, [the defense attorney] said, 'You've got a drunk man being confronted by the first time a man who was angry at him.' Where is that evidence?"

The court overruled defense counsel's objection that opening statements were not evidence. The prosecutor continued,

> "Is that what happened in this trial? Those were the promises made to you by these attorneys. Is that what happened? How many times has Mr. Gutierrez changed his story, has this side changed their story?"

Defense counsel objected that the prosecutor was "[impugning] defense counsel." The court overruled the objection, and the prosecutor concluded,

> "They argued for something completely different in the very beginning. And now they are arguing for the least they can get. That's what you have here. This is the least you can get. Defense asking you to convict him of this is literally the lowest you can convict him of."

The prosecutor made a similar remark in describing Alec's stabbing. For the jury to find attempted voluntary manslaughter as urged by defense counsel, it would have to find that Gutierrez intended to kill Alec. However,

> "[Gutierrez] testified I wasn't trying to kill him. I was just trying to hurt him in a minor way. They're not even following what their client said on the stand. How are we going to change over and over and over again asking for the minimum? Can we get the minimum here? Can we get the minimum here? What about now? Can we get the minimum here?"

The court again overruled a defense objection that the prosecutor was "[impugning] defense counsel. The prosecutor continued, "[h]ow many times are we going to change?" He then remarked, "there is one thing you learn in this place. There's no winners, there are no losers here. . . . But at least call it for what it is."

Gutierrez believes the trial court forced him to elect his defense as to John's murder, precluding him from presenting evidence to support his theory at trial that John confronted him. In this context, while the prosecutor could point to the lack of evidence to support the defense theory, it was improper under *Pantages* to thereby impugn defense counsel's good faith by asking, how many times "has this side changed their story?" By

overruling defense objections, Gutierrez contends the court ratified the mistake, resulting in prejudice on both counts.

As discussed in section 3.b *ante*, we reject the premise that the trial court compelled Gutierrez to elect a defense. Even so, we question the People's claim that the prosecutor was simply commenting that *Gutierrez* had changed his story. During rebuttal, the prosecutor repeatedly suggested the defense team was changing its theory midstream to find a way to "get the minimum" or argue "for the least" conviction their client could face. The record admittedly differs from *Pantages*—here, the court did not prevent Gutierrez from presenting evidence that John was the aggressor. Nevertheless, the prosecutor arguably committed error under *Pantages*, *supra*, 212 Cal. at page 245 by attacking defense counsel's motives in urging the jury to convict.

As official representatives of the people, prosecutors have a duty to be reasonably objective in their closing statements. (*People v. Talle* (1952) 111 Cal.App.2d 650, 677.) "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." (*Hill*, *supra*, 17 Cal.4th at p. 832.) "Casting uncalled for aspersions on defense counsel directs attention to largely irrelevant matters and does not constitute comment on the evidence or argument as to inferences to be drawn therefrom." (*People v. Thompson* (1988) 45 Cal.3d 86, 112.) The Supreme Court has rejected a claim of prosecutorial misconduct where the prosecutor observed during closing remarks that " 'any experienced defense attorney can twist a little, poke a little, try to draw some speculation, try to get you to buy something,' " finding this did not "amount to a personal attack on counsel's integrity." (*People v. Medina* (1995) 11 Cal.4th 694,

759 (*Medina*).) On the other hand, "[i]t is improper for the prosecutor to imply that defense counsel has fabricated evidence or to otherwise malign defense counsel's character." (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1075 (*Herring*).)

When a claim of misconduct is based on the prosecutor's remarks to the jury, we consider whether there is a reasonable likelihood that the jury construed the challenged remarks in an objectionable fashion. (*People v. Williams* (2013) 56 Cal.4th 630, 671 (*Williams*).) Contrary to the People's claim, there is a reasonable likelihood the jury would have viewed the prosecutor's remarks as implying that defense counsel was mission-driven to "get the minimum" regardless of what the evidence showed. Such remarks arguably went further than the comment in *Medina* that experienced defense attorneys " 'twist' " or " 'poke' " to get the jury to " 'buy something.' " (*Medina, supra*, 11 Cal.4th at p. 759.)

Nevertheless, assuming misconduct occurred, it was not prejudicial. Rarely do a prosecutor's personal attacks on defense counsel amount to reversible misconduct. (*People v. Taylor* (2001) 26 Cal.4th 1155, 1167.) Prosecutorial misconduct requires reversal under the federal Constitution when it infects the trial with such unfairness as to make the resulting conviction a denial of due process. (*Williams*, *supra*, 56 Cal.4th at p. 671.) Misconduct not rising to this level is reviewed for prejudice under state law—we consider "whether it is reasonably probable that a jury would have reached a more favorable result absent the objectionable comments." (*Ibid.*; *Herring*, *supra*, 20 Cal.App.4th at p. 1074.) As we explain, the error here was harmless under either

standard. The prosecutor's remarks did not result in a fundamentally unfair trial or raise a reasonable probability of a more favorable result absent the challenged comments.

Accepting his claim that the defense case rested "squarely" on his credibility, Gutierrez severely hampered his own credibility through shifting accounts and a hard-to-believe narrative. Although he previously told detectives that John said something that made him angry and that he remembered stabbing him, at trial Gutierrez testified no words were exchanged, and he could not remember the stabbing. Any misconduct from stating that defense counsel shifted theories midstream was no more devastating to Gutierrez's credibility than trial evidence that *he* had done the same.

Indeed, Gutierrez's account would be hard for any jury to believe. He had no problem remembering how many drinks he ordered, getting kicked out of Angels, interacting with Luis and Raquel, being driven home, grabbing a knife, ignoring his mother's pleas, returning to Angels to "get even," seeing John pull his car toward where he stood, moving out of the way to avoid the vehicle, and standing face-to-face with John. He could not remember what happened next. But then his memory picked back up when he remembered interacting with Alec. The prosecutor appropriately highlighted the absurdity of Gutierrez's testimony. (See *People v. Lawley* (2002) 27 Cal.4th 102, 156 [fair comment for the prosecutor to describe defense evidence as a " 'total farce' " and " 'ludicrous' "].)

Moreover, the trial court instructed the jury that comments by the attorneys were not evidence (CALCRIM Nos. 104, 222) and that the jury alone had to decide what happened based solely on the trial evidence (CALCRIM No. 200). These instructions

further minimized any prejudice from the prosecutor's closing remarks. (See, e.g., *People v. Smith* (2005) 135 Cal.App.4th 914, 925; *People v. Loker* (2008) 44 Cal.4th 691, 739.) On this record, any prosecutorial misconduct during closing argument was patently harmless.

4. *Cumulative Error*

Gutierrez argues that the admission of "angry drunk" character evidence, exclusion of hallucination evidence, compelled election of defenses, and prosecutorial misconduct resulted in cumulative error. Because we find no error or no prejudice as to each of the asserted claims, it follows that any cumulative effect of the claimed errors " ' "does not warrant reversal of the judgment." ' " (*People v. Jablonski* (2006) 37 Cal.4th 774, 825.)

5. *Limited Remand under* Franklin

Gutierrez's controlling offense was the first degree murder of John in count 1, for which the court imposed 25 years to life. (§ 3051, subd. (a)(2)(B).) Because he was 25 years or younger at the time of that crime, he "shall be eligible for release on parole during [his] 25th year of incarceration at a youth offender parole hearing." (§ 3051, subd. (b)(3).) At his parole hearing, the Parole Board must "give great weight to the diminished culpability of juveniles as compared to adults, the hallmark features of youth, and any subsequent growth and increased maturity of the prisoner in accordance with relevant case law." (§ 4801, subd. (c).)

In *Franklin*, the Supreme Court concluded that the enactment of section 3051 rendered moot an Eighth Amendment challenge that a lengthy sentence was the functional equivalent of life without the possibility of parole and violated *Miller v.*

Alabama (2012) 567 U.S. 460. (*Franklin*, *supra*, 63 Cal.4th at p. 280.) Nevertheless, it was unclear whether the defendant in *Franklin* had received "sufficient opportunity to put on the record the kinds of information that sections 3051 and 4801 deem relevant at a youth offender parole hearing." (*Id.* at p. 284.)[13] Accordingly, the court remanded the matter to the trial court for the limited purpose of determining whether the defendant was afforded such opportunity and, if not, to make a record of youth-related mitigating factors. (*Ibid.*)

Gutierrez seeks a limited remand under *Franklin* to enable him to make a record of youth-related factors for an eventual youth offender parole hearing. He was 24 years old when he committed his offenses. At the time of his sentencing in June 2017, defendants needed to be "under 23 years of age" at the time of the offense to be eligible for early parole. (§ 3051, former subd. (a)(1); Stats. 2015, ch. 471, § 1.) Effective January 1, 2018, the Legislature amended section 3051 to raise the cutoff to persons who were "25 years of age or younger" at the time of the offense. (§ 3051, subd. (a)(1); Stats. 2017, ch. 684, § 1.5.)

The People concede that in light of the statutory change, a limited remand under *Franklin* is appropriate. We accept this concession. No evidence of age and immaturity was presented at sentencing, as Gutierrez was ineligible for early parole eligibility under section 3051, former subdivision (a)(1). Therefore, consistent with *Franklin*, the court

---

13 The trial court had admitted defendant Franklin's mitigating statement and a handwritten note from his mother at a postsentencing hearing. (*Franklin*, *supra*, 63 Cal.4th at p. 283.) No similar evidence was received here.

"may receive submissions and, if appropriate, testimony pursuant to procedures set forth in section 1204 and rule 4.437 of the California Rules of Court, and subject to the rules of evidence. [Gutierrez] may place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Franklin*, *supra*, 63 Cal.4th at p. 284.)

DISPOSITION

The matter is remanded for a limited purpose to permit Gutierrez to "place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing." (*Franklin*, *supra*, 63 Cal.4th at p. 284.) In all other respects, the judgment is affirmed.

DATO, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.